221 N. Virginia St., Inc. d/b/a Silver Spur Casino *and* Hotel, Motel, Restaurant Employees and Bartenders Union Local No. 86, Hotel Employees & Restaurant Employees International Union, AFL-CIO

Mason Corporation d/b/a Reno's Horseshoe Club *and* Hotel, Motel, Restaurant Employees and Bartenders Union Local No. 86, Hotel Employees & Restaurant Employees International Union, AFL-CIO. Cases 32-CA-4208-2 and 32-CA-4253

31 May 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 13 May 1983 Administrative Law Judge James S. Jenson issued the attached decision. The Respondents filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

We agree with the judge that the Respondent, Silver Spur Casino, unlawfully encouraged and assisted employees in repudiating the Union. Further, we agree that knowledge of this unlawful conduct is attributable to Reno's Horseshoe Club, the successor employer, and, accordingly, that the latter did not have a reasonably based doubt concerning the Union's representative status on 29 January 1982 when it declined to bargain with the Union, as requested. Indeed, on that occasion, the successor's refusal was not grounded at all upon any claim that the Union's status was in doubt, but rather upon the contention, since abandoned, that, upon transfer of the business, there was "no entity for [the Union] to resume bargaining with."[2]

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Members Hunter and Dennis would consider employee turnover a factor in determining the existence of objective considerations sufficient to justify withdrawal of recognition. Under all circumstances of the instant case, however, they do not find the high turnover rate dispositive.

Member Zimmerman would also find that, in the circumstances of this case, a reasonably based doubt concerning the Union's representative status, even if entertained, would not negate the Respondents' bargaining obligation. Almost 7 years elapsed between the time Silver Spur unlawfully withdrew recognition from the Union on 20 December 1974 and the commencement of negotiations on 28 October 1981. This followed protracted litigation during which Silver Spur unsuccessfully challenged the Board's bargaining order. A second bargaining session was held on 11 November 1981. Negotiations broke off after the third and final session on 3 December when Silver Spur informed the Union of its impending acquisition by Reno's Horseshoe Club.

Based on these facts, it can hardly be said that the bargaining relationship, which was the subject of our Order, has been "permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, 221 N. Virginia St., Inc. d/b/a Silver Spur Casino, Reno, Nevada, and Mason Corporation d/b/a Reno's Horseshoe Club, Reno, Nevada, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. This matter was heard in Reno and Sparks, Nevada, on December 7 and 8, 1982, respectively. The consolidated complaint issued on May 25, 1982, pursuant to a charge and first amended charge filed on January 18 and May 24, 1982, respectively in Case 32-CA-4208-2, and a charge filed on February 3, 1982, in Case 32-CA-4253. The consolidated complaint alleges, in substance, that (1) in October 1981 agents of Respondent Silver Spur participated in the distribution and circulation of a petition to decertify the Union in violation of Section 8(a)(1) and (5); and (2) that in the same month, and again in December, an agent of Respondent Silver Spur and Respondent Horseshoe violated Section 8(a)(1) and/or (3) by informing an employee that she would not be hired by Respondent Horseshoe because she refused to sign the decertification petition, and by refusing to employ her; and (3) that since January 1982, Respondent Horseshoe has violated Section 8(a)(5) by refusing to recognize and bargain with the Union in a unit encompassing employees of both Respondent Silver Spur and Respondent Horseshoe. Respondents deny Respondent Silver Spur instigated or encouraged the decertification petition; that an employee was either threatened with, or was denied, employment by either Respondent because of her failure to sign the decertification petition; or that Respondent Horseshoe unlawfully refused to bargain with the Union, on the ground Respondent Horseshoe had a good-faith doubt of the Union's majority status based on objective considerations. All parties were afforded full opportunity to appear, to introduce evidence, and to examine and cross-examine witnesses. Briefs were filed by the General Counsel, the Respondent, and the Charging Party and have been carefully considered.

On the entire record in the case, including the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Mason Corporation d/b/a Reno's Horseshoe Club is engaged in the operation of a restaurant, bars, and a casino, which includes adjacent like facilities formerly operated by 221 N. Virginia St., Inc. d/b/a Silver Spur Casino. It is alleged, admitted, and found that, at all times material herein, Horseshoe Club and Silver Spur Casinos, individually, and Horseshoe Club mereged and consolidated with Silver Spur, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and found that Hotel, Motel, Restaurant Employees & Bartenders Union, Local No. 86, Hotel Employees & Restaurant Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUES

1. Whether Respondent Silver Spur unlawfully participated in the distribution and circulation of a decertification petition among its employees.

2. Whether, in October and on December 31, 1981, Evelyn Jackson, an agent of Respondent Silver Spur and Respondent Horseshoe respectively on said dates, informed Lois Webb she would not be hired by Respondent Horseshoe because she refused to sign a petition to decertify the Union.

3. Whether Respondent Horseshoe failed and refused to employ Webb because she joined or assisted the Union and/or she refused to sign the decertification petition.

4. Whether Respondent Horseshoe unlawfully failed and refused to bargain with the Union.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

On April 4, 1977, the Board issued a decision in *Silver Spur Casino*, 228 NLRB 1147, finding that the employer, Respondent Silver Spur herein, had violated Section 8(a)(5) of the Act by withdrawing recognition from, and refusing to bargain with the Union, the Charging Party herein. The Board ordered Respondent to recognize and bargain with the Union. On May 27, 1980, the Ninth Circuit Court of Appeals enforced said order.[1] The Supreme Court denied certiorari on April 20, 1981, 451 U.S. 906, and denied a petition for rehearing on June 8, 1981, 452 U.S. 931. By letter dated April 29, 1982,[2] an official of the Union requested a meeting with one of the Silver Spur's owners to discuss a format for negotiations. By letter of May 14, the attorney for the Silver Spur responded that the request was premature on the ground the Company had filed a petition for rehearing with the Supreme Court. By letter dated June 2, the Union requested material in preparation for meeting to negotiate. Sometime in June, after the Supreme Court had denied the petition for rehearing, Dwayne Kling, the Silver Spur's general manager, met at the offices of the Reno Employers Council along with representatives of several other casinos that had similarly been found by the Board and the Court to have unlawfully refused to bargain with the Union. Clinton Knoll of the Reno Employers Council informed those present of the Supreme Court's ruling, that it was "the last shot," that the clubs were supposed to bargain, and that a decertification petition "was a possibility of a certain route that could be taken by Casionos" [sic]. On July 15, Knoll, who represented Respondent Silver Spur in collective-bargaining negotiations, provided the Union with part of the requested information. By letter dated July 24, the Union requested that Knoll provide it with certain additional information. The first of three negotiation meetings was held on October 28 in the Reno Employers Council offices. The second was on November 11 and the third on December 3, both in the same location as the first. At the last meeting, the Union was informed that the Silver Spur was in the process of being sold to the Mason Corporation, and that while bargaining would continue, any contract reached would have to terminate January 31. In the meantime, on December 1, Respondent Mason Corporation and Respondent Silver Spur entered into a written agreement whereby the Mason Corporation agreed to purchase all of the Silver Spur's stock. Its intent was to consolidate the two operations into one.[3] Openings were made in the common wall separating the two facilities, and the Horseshoe took over the ownership and operation of the entire combined facility on January 1, 1982. Thereafter the Mason Corporation declined to bargain with the Union on the ground the Union, which was not certified, did not enjoy the support of a majority of the unit employees as evidenced by a decertification petition filed with the Board which was signed by more than 70 percent of the employees, and a substantial turnover in the employee complement of the Silver Spur. With few exceptions, the Silver Spur's employees, all of whom were terminated on December 31, were hired by the Horseshoe as of January 1, 1982. Lois Webb, a waitress, was one of the exceptions.

There is considerable testimonial conflict with respect to the role supervisors or agents of the Silver Spur played in the instigation and circulation of employee decertification petitions, the General Counsel contending Respondent Silver Spur overstepped legitimate bounds and interfered with employee rights under Section 7. Respondents contend the General Counsel's case is based on noncredible evidence, but that even if the General Counsel's witness is credited, its involvement was not unlawful since it consisted merely ministerial acts.

Dwayne Kling was the general manager, a supervisor, and an agent of the Silver Spur until it merged with the Horseshoe on January 1, 1982, after which he was the manager, a supervisor, and an agent of the latter. The

[1] 623 F.2d 571.

[2] All dates hereafter are in 1981 unless otherwise stated.

[3] The Mason Corporation owned the Horeshoe Club located adjacent to the Silver Spur.

record also establishes that in late November he was offered the general managership position with the Horseshoe but that he did not accept the offer until late December. The complaint was amended at the hearing to allege Kling as an agent of the Horseshoe since on or about an unspecified date in November. Upon the evidence I find that Kling was indeed an agent of the Horseshoe throughout the month of December although not actually employed by that entity until the first of January. The amended complaint alleges, and it is admitted and found, that Evelyn Jackson was a supervisor and agent of Silver Spur until December 31, and from January 1, 1982, until mid-February 1982, was a supervisor and agent of the Horseshoe. It is also found, as alleged, that she was an agent of the Horseshoe from December 15 through the end of the year. Helen Fryer was employed as a swing shift waitress by the Silver Spur through December 31, and thereafter by the Horseshoe until both she and her husband quit over a dispute between her husband and a supervisor. Fryer, who was strongly opposed to the Union in 1981,[4] had threatened to quit because of conflicts with Evelyn Jackson. Fryer was one of two employees who circulated decertification petitions in October. The other petition circulator was cashier Jeannie Barber, who was also employed by the Horeshoe when it took over the Silver Spur operations. Barber had been a nonunion employee for over 40 years. Clinton Knoll, as noted infra, is an official of the Reno Employers Council which represented the Silver Spur for collective-bargaining purposes. As such, Knoll was an agent of Silver Spur. Lois Webb, the alleged discriminatee, was employed as a waitress by the Silver Spur from 1972. She was not hired by the Horeshoe. Her testimony attributes allegedly unlawful statements to Jackson, upon which the General Counsel relies in contending the Horseshoe unlawfully failed and refused to hire Webb on January 1, 1982.

Respondents admit that since January 1, 1982, a single unit comprised of Horseshoe's employees working in both the former Silver Spur premises and its own facility is appropriate. While in their answer to the consolidated complaint Respondents denied the Horseshoe is the legal successor to the Silver Spur, in their posthearing brief the successorship is recognized, and the facts so establish. Thus, it is seen that the merged operation continued to engage in the same business performing the same services and serving the same customers; the Silver Spur's employees were merged and integrated with those of the Horseshoe's and comprised a majority of the total number; the Silver Spur's supervisory hierarchy continued working for the Horseshoe, and after a few days in January, were retained to the exclusion of the pre-January 1 Horseshoe supervisors; the same equipment was utilized; and the merged operations continued in the same locations. The foregoing establish a continuity of the employing industry, the keystone to determining the issue of successorship. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

[4] She had been a union member for 30 years but withdrew in 1977 because she was not getting any benefits. In the fall of 1981, she testified, she did not want to be represented by the Union.

B. *The Decertification Petition*

As noted earlier, sometime in June following the Supreme Court's denial of a rehearing, Knoll met with representatives of the various casinos that were affected by the Court's ruling, including Kling, and informed them that the Court's ruling was "the last shot" and suggested the possibility of decertification by the casinos. Kling admitted on cross-examination that he had asked, and been told by Knoll, prior to employees Barber and Fryer having circulated petitions in support of a decertification petition, what language should be used. The role that Kling and Jackson played in the origin of the employee petitions is in dispute.

According to Fryer, in early October she was approached by Jackson at the cashiers cage as she was signing in for work. Jackson brought up the fact that the Union and Silver Spur were going to enter into negotiations,[5] and that "I think it should be a petition circulating," for people who did not want the Union. Fryer's response was "Oh, the hell with it."[6] Approximately 2 weeks later, according to Fryer, Kling approached her while she was on her break at the employees table having a snack. Her testimony was:

> A. Mr. Kling said something about the union, that we should have a petition, and I said, "What are you asking me?" I said, "Are you asking me to circulate a petition?"
>
> He said, "No, I am not asking you." I told him I was very aggressive and I would do it, and he said, "But I am not asking you." I said I was doing it on my own.
>
> Q. How did you happen to say you were doing it on your own?
>
> A. I don't know.
>
> Q. Didn't he ask you if you were doing it voluntarily?
>
> A. Yes, he asked me if I was doing it voluntarily, and I said "Yes."

She testified that later, on her day off, she received a telephone call at home from Kling, who introduced her to Knoll. She testified as follows:

[5] Fryer had read in the newspaper that negotiations were going to take place.

[6] Fryer had encountered previous conflicts with Jackson, about whom she had complained to management. She had told Kling that she was going to quit because she could not work with Jackson. She also admitted strong opposition to the Union, having taken out a withdrawal in 1977 because she was not getting any benefits after 30 years of union membership. Jackson denied any discussion with Fryer about circulating a petition, and Barber, who was in the cashiers cage at the time Fryer claims Jackson made the statement, denied overhearing the conversation. It was shown however, that Barber might have been engaged in cashier duties and would have been distracted. I credit Fryer's testimony over Jackson's denial Fryer was not reluctant to admit her dislike for Jackson, and I view her response to Jackson's suggestion as consistent with her antagonism toward Jackson. As will be seen hereafter, while I do credit Jackson in some respects, I do not in others. To the extent I credit Jackson and other witnesses only in part, I do so on the evidentiary rule that it is not uncommon "to believe some and not all of the witness's testimony." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

A. Mr. Kling called me at home and introduced me to Clint Knoll from the Employer's Council, and he said would I talk to Mr. Knoll. Mr. Knoll told me what to write on the top of my petition, and I took notes and wrote what he hold me to write. And he said that when the people signed it to also have them date it.

Q. Did Mr. Knoll give you any other instructions?

A. After it was circulated that I was to send it to the Labor Relations Board in Oakland, California.

Q. Did Mr. Knoll tell you where to circulate the petition?

A. Amongst the culinary, amongst the bartenders and the waitresses.

. . . .

Q. Do you recall any discussion about your circulating the petition on any shift other than your own?

A. Yes. I asked Mr. Kling if I should do it on all shifts, and he said he had approached Jeannie Barber and Jennie would do it on day shift, and also on our graveyard shift.

Q. Who was Jeannie Barber?

A. The cashier at the Silver Spur in the restaurant.

Q. Prior to that conversation had you ever heard of Clint Knoll?

A. Never, never.

Q. After your conversation with Mr. Kling and Mr. Knoll that day, what, if anything, did you do about a decertification petition?

A. I wrote it on a yellow legal pad, I was on my day off.

Q. What did you write?

A. I wrote what Mr. Knoll told me to write for the petition, and I took it down to the Silver Spur, hunted up Mr. Kling in the Keno lounge, he looked at it and said it looked O.K., so I started to circulate it, and it was on my day off.

Q. Did you ever have any further conversation with Dwayne Kling regarding the decertification petition you circulated?

A. Yes. He called me at home on a Sunday and asked me to meet him in his office to bring the petition before I went to work. It was a working day, so I got there about 2 or 2:15 and gave him the petition. I asked him if he wanted me to mail it, and he said "No."

Q. What did you do with it?

A. I left it there. He said he would mail it in. He said he would mail in Jeannie Barber's petition that she had circulated.

Q. He said he would mail Jeannie Barber's petition in also?

A. Yes.

Kling testified that in early October, as he was passing the cashiers cage where Barber worked, Barber brought up the subject of the forthcoming bargaining, stating she did not want to join the Union, and asked if there was anything she could do about it. Kling stated, "I really don't know that much about what you can do," and invited her to discuss it further with him in his office on her break. He testified, "So with a time span of an hour or two, she came up to my office. That is when I told her that we had been involved with the Reno Employers Council for seven years, and that Clint Knoll was an expert on such situations. And, at that time I gave her his phone number and address." He later asked her what Knoll had told her to do. With respect to Fryer, he testified he was in the restaurant area one day when Fryer told him "she had heard that there was going to be a petition distributed by Jeannie Barber." Kling confirmed that was going to happen. His testimony as to what transpired thereafter is confusing and self-contradictory. He testified, "I don't recall ever, I don't recall going to the office with Helen [Fryer]. I know that I talked to her on the phone from my office and introduced her to Clint Knoll over the telephone."[7] He expressed the supposition that Barber and Fryer had already discussed the decertification matter. He then testified, "So that is why Helen [Fryer] came up to the office and called, or I called Clint Knoll, and introduced him over the phone . . . I called Clint and Helen was sitting there in my office." He then stated that he had asked Fryer to come to his office "the early part of October when she had asked me about the petition. I did not ask her to do a petition. She volunteered to do the petition" and asked how. He then stated he did not know and that Knoll "is the expert in that field." He then denied he had called Fryer in Knoll's presence, thereby directly contradicting his earlier testimony that he had talked to her on the phone from his office and introduced her to Knoll over the phone.[8] On cross-examination he testified that, after Fryer had talked to Knoll, she brought the petition to him and asked if the wording was all right. He responded, "It looks all right to me. It sounds like Clint Knoll and said what he had said to put on there." Kling admitted the petitions circulated by both Fryer and Barber were delivered to him because "I had told them that I would mail them for them." He acknowledged examining who had signed the petitions and making copies of both. He mailed the envelope containing the petitions to the Board's Oakland Office.

Barber testified she had heard rumors of the Union trying to come in, and since she had worked for 40 years without a union, she concluded she did not need one.[9] She claims she had talked to Fryer a few days before October 20 about getting a "petition started," and that Fryer expressed antiunion sentiment and "agreed on getting a petition." She testified that a couple of days prior to October 20 she told Kling, "I had talked it over with some of the girls, they did not want the Union in here, and what could we do about it, and he referred me to Clint Knolls." The next day she went to Knoll's office. Her account of what transpired was as follows:

[7] This admission corroborates Fryer's testimony that she was called at home by Kling who introduced her to Knoll over the telephone.

[8] Knoll was not called as a witness.

[9] She testified a number of other employees felt the same way.

> Just like I explained to you before, we did not want the union, and I asked him what could we do about it, who could we write to or what could we do. He said to get the petition up and be sure you have each employee that signs the petition put the date that they sign it beside their name, and he told me who to send it to, Mr. Lawrence Hanson in Oakland, California.

Her conversations with both Kling and Knoll indicate a lack of any prior knowledge about a decertification petition. Moreover, if the two women had agreed to work together in "getting a petition," there would have been no need for Knoll to have given both of them instructions. Accordingly, I do not credit her testimony to the effect that she and Fryer had earlier agreed on "getting a petition."

There is no dispute over the fact that two women circulated the petitions throughout the Silver Spur and that both Kling and Jackson were aware of what they were doing. While Jackson claimed she had never read any of the names on the petitions, nor knew who had signed them, Kling contradicted her by testifying that he had discussed who had and who had not signed with both her and Barber.

Fryer's petition contains 31 employees signatures bearing dates of October 20, 21, and 22. Barber's petition, which is addressed to a Board agent in Oakland, bears 26 signatures bearing dates of October 20, 22, 23, 24, and 25.[10]

After making copies, both petitions were forwarded to the Board's Regional Office in Oakland by Kling who paid the postage. A Board agent completed an RD petition form and forwarded it to Barber, who signed it on November 13. It was filed as Case 32-RD-353 on November 18. By letter dated December 8, Barber was notified by the Regional Director that he was dismissing the petition. The letter recites a history of the refusal to bargain litigation which culminated in the Supreme Court's denial of the petition for rehearing, and outlines subsequent negotiations. In addition to informing Barber of her right of Board reivew, the letter states further in pertinent part:

> After careful consideration, I have concluded that the petition cannot be entertained at this time. Initially, it should be noted that six and one-half years elapsed between the time that the Employer withdrew recognition from Local 86 and June, 1981, when the Supreme Court denied the Employer's petition for rehearing, thus finally validating the order to bargain. Thereafter, in part because Local 86 was the recipient of several other bargaining orders against employers in the Reno and Lake Tahoe (Nevada) areas, and in part because of delays in furnishing certain information relevant to the bargaining process, negotiations did not commence until four and one-half months later. Thus, it cannot be concluded that the Union has enjoyed a "reasonable time" under the circumstances herein, to engage in collective bargaining with the Employer towards consummation of an agreement. Accordingly, the instant petition cannot now raise a question concerning the representation of the employees covered by the outstanding bargaining order and I am, therefore, dismissing the petition filed herein.

Barber contacted Knoll, who prepared a timely appeal letter. As Knoll thought it would be a good idea for Fryer to also sign the appeal, Barber called her and she came to Knoll's office and also signed.[11] The Regional Director's dismissal of the RD petition was affirmed by the Board on February 5, 1982.

Conclusion

Respondent argues that "The aggregate of Kling's and Knoll's actions amount to nothing more than ministerial acts in response to requests from Barber and Fryer. They had no possible effect on any employee's decision to sign or not to sign the petition. The test, as posited in *Dayton Blueprint Co.*, 193 NLRB 1100 (1971), is whether the petition would have been filed even without any of the employer's actions. In this case there can be no doubt that Kling and Knoll acted only to provide acts of ministerial assistance at the employees' request. There was no intent to influence any employee to sign a petition." The General Counsel argues that the Silver Spur's assistance in the preparation and processing of the decertification petitions "went far beyond even arguably permissible conduct."

Under all the circumstances herein, I reject the contention of Respondents concerning the minimal extent to which agents and supervisors of the Silver Spur were involved with the decertification petitions. In my view, their involvement constitutes far more than mere ministerial aid such as the Board might find not unlawful. The evidence clearly shows that the idea of decertification originated with Knoll at the June meeting of representatives of the casinos affected by the Supreme Court's denial of a rehearing; Kling was present and admitted discussing with Knoll at some point in time prior to the time Barber and Fryer circulated petitions, the wording of such a petition. Thereafter, the credited evidence shows the idea was implanted in the employees' minds by Jackson and Kling. Thus, in early October, Jackson told Fryer that she thought a petition shoud be circulated for those employees who did not want the Union; sometime in mid-October, Kling approached Fryer and also suggested employees should get up a petition, which Fryer agreed to do; Kling later called Fryer at home, introduced her to Knoll, who then provided the language to be used on the petition; Knoll told her among which classifications of employees she should circulate it, and gave her instructions on getting it signed and dated by the individual signers; he also told her to send it to the Board's Oakland office; Kling approved the language on

[10] One each on the latter 3 days.

[11] A similarly worded dismissal letter from the Region involving the Nevada Club Casino, Case 32-RD-359, was issued on January 18, 1982, and a similarly worded appeal from the dismissal was made on January 28, 1982. It is obvious from the format of the appeal letter that it was prepared in Knoll's office.

the petition which Fryer had written out and taken to him prior to circulating it for signatures; after she had circulated the petition among the employees, Kling called Fryer at home and asked that she bring it to his office that day before going to work, which she did; when Barber informed Kling she did not want to join the Union,[12] Kling referred her to Knoll, who provided the language and instructions for circulating a decertification petition; Kling also told Barber to return the signed petition to him, which she did; the petitions were circulated with Kling's knowledge and approval and in Jackson's presence; Kling discussed with both Jackson and Barber who had and who had not signed the petitions; Kling examined and made copies of both petitions, provided the postage, and mailed them to the Board; after the decertification petition in Case 32-RD-353 was dismissed, Knoll prepared the appeal letter. It is clear that the decertification petition was not only the brainchild of the Silver Spur's agents, but that from the time "decertification" was first implanted in their minds, Fryer and Barber were influenced and assisted by agents of the Silver Spur, namely, Kling, Knoll, and Jackson. For all the above reasons, I conclude Respondent Silver Spur's encouragement and assistance in the circulation of petitions to decertify the Union was unlawful. *Cummins Component Plant*, 259 NLRB 456 (1981); *Crafttool Mfg. Co.*, 229 NLRB 634 (1977); *Texas Electric Coop*, 197 NLRB 10 (1972).

C. *Failure to Employ Lois Webb*

Webb testified that early one morning in late October, at the cashiers cage, Barber asked if she wanted to sign the petition, which she declined to do. About 15 or 20 minutes later, while she was having coffee in the back of the restaurant with Jackson, Barber, and Betty Lowry, a waitress, Barber asked the latter if she wanted to sign, and Lowry stated she did not think so.[13] Webb testified that the same afternoon she saw Fryer approach Jackson at the cashiers cage and she observed Jackson take out a piece of paper that looked to Webb like the petition she had seen that morning. According to Webb, Fryer took the paper over to the employees' table, where Webb asked Fryer if she was "scabbing." Fryer, according to Webb, answered in the affirmative.[14] Webb's purported response was "that is why we don't have a good union in this town, because the gals can't stick together." She testified that about a week later she had the following conversation with Jackson:

> She asked me what I was going to do at the end of the year or the first of the year, I guess they are the same, what was I going to do, look for a job or draw unemployment. I said to her, I said, "What do you mean?" She said, "Well, when the Horseshoe takes over the first of the year you won't be hired because you did not sign the petition." I said, "Well, they can't not hire me for that reason," I said, "I will go to the union over it," and she told me that she would deny saying what she said to me.
>
> I said, "Well, it is my word against yours, and mine is just as good as yours is." She said, "Well, we'll wait and see."

Jackson denied that she ever engaged in a discussion with Webb concerning signing or not signing a petition. Webb went on to testify that, on December 3, a notice was posted by the timesheet that the Silver Spur had entered into negotiations with the Horseshoe for the sale, which would take effect at midnight December 31. On December 23, employees were notified that, as of December 31, everyone would be terminated, and that anyone interested in employment with the Horseshoe should request an application from their department supervisor. On December 24, Webb received an application from Jackson, which she returned the following day. Webb testified that as she was getting ready to leave on December 31, "She [Jackson] called me over and said 'Lois, I have no new hire for you,' and I said 'Why?' She said, 'Because they don't want you,' and I said, 'Who are they?' She said, 'Dwayne, and you did not sign that petition.'" She testified that a few minutes later she asked Kling why she was not hired and that he said he did not know and proceeded to walk away. Webb denied she ever received any oral warnings, but admitted she received a written employee warning form from Jackson in August. Marked on the form as offenses were "Refusal to obey orders" and "Leaving work without permission." The offenses are explained on the form as follows: "Was told to wipe ash trays, only dumps them and leaves work early. Shift change time is 2:45. Leaves 2:40." Webb admitted she was careless in not wiping out ashtrays and contended she left early only after she was relieved on her station. She also admitted on cross-examination that Jackson had spoken to her earlier about leaving early, but that she continued to do so because she did not consider Jackson to be her "boss."[15] She stopped leaving earlier after receiving the written warning. She also admitted on cross-examination that, in the spring of 1979, she was called into the office to talk to Kling and Restaurant Manager King because of problems she was having with other employees.[16] She admitted to having a quick temper and a tendency to talk loudly because she is hard of hearing. She acknowledged that other employees sometimes became angry with her for raising her voice. She also acknowledged that after she received the written warning, she was not friendly with Jackson and spoke to her only when absolutely necessary.

Jackson, as noted earlier, denied she had any discussions with Webb about signing or not signing a petition. She admitted she was present at the employees' table

[12] Nevada is a right-to-work State and therefore Barber would not in any event have had to join the Union.

[13] Lowry, however, did sign the petition on October 20, as did Mary Torrez. I conclude, therefore, that these conversations occurred on that date.

[14] Fryer did not coroborate Webb's testimony in this respect. As noted infra, Fryer got the language for her petition from Knoll, had it approved by Kling, and circulated it herself. The evidence totally refutes the idea that Fryer and Barber circulated the same petition or that Jackson had physical possession of Fryer's.

[15] Jackson had been head hostess since 1979 and was made a supervisor on July 27.

[16] Fellow employee Judy Harold had made a written complaint about her, which Webb characterized as "lies."

when Barber asked Webb if she wanted to sign, and that Webb said she did not until she had talked to her husband, and that she was going to wait and see what the Union could do for her.[17] Jackson named other employees that had complained about working with Webb, one reason being that she wanted her orders filled first. She testified that, even after issuing the warning regarding failure to wipe out ashtrays, Webb still neglected to do so. The warning with respect to Webb's leaving early was made because Webb's relief complained that Webb always wanted to leave early and that she was having to go on shift early. She testified that, in mid-December, Executive Chef Hughes stated that Webb would not be hired by the Horseshoe, and that she said it was all right with her.[18] She later informed Kling of Hughes' decision, and Kling gave his approval.

Barber testified to Webb's inability to get along with other employees, particularly the Mexican busboys, and that one employee quit "because she said she could not take Lois."

Kling testified that, in early September, the owners of the Silver Spur decided to see if they could expand by either purchasing or leasing the Horseshoe, which was owned by nonresident owners. Inquiries were made, but it was decided the Mason Corporation wanted too much money. The Mason Corporation, however, suggested buying out the Silver Spur. As discussions became more serious, the Mason's asked to see the financial statements of the Silver Spur in early October. In early November, the Mason's concluded that the Silver Spur was producing better than the Horseshoe. In late November, the Mason's asked Kling if he would consider working for them as general manager. Kling responded that he would consider it. He testified that his main concern at that time was to sell the Silver Spur, and it was not until late in December that he told the Mason's he would accept the job of general manager. The agreement for the sale was not signed until December 1, to be effective January 1, 1982. The employees were not informed of the sale until December 3. Thus, it is seen that the agreement to purchase the Silver Spur had not been made at the end of October when Webb claims Jackson told her she would not be hired by the Horseshoe because she did not sign the decertification petition. Webb's testimony to that effect was contrived and is not credited. Nor was she a union adherent. The record shows a petition favoring the Union was circulated among the employees. Two employees, neither of whom was Webb, signed it. Further, footnote 3 of the administrative law judge's decision in the earlier refusal-to-bargain case involving the Silver Spur, which was adopted by the Board,[19] recites: "According to [Lois] Webb, a union official, Marie Tidwell, asked her in the fall of 1974 if she would reconsider her past refusals to join the Union. Webb replied 'The day that you tell me that I have to join the union in order to keep my job, that is the day I will join the union—and not until then.' Webb recalled. Webb recalled that Tidwell 'kind of laughed' and said 'Well, I can tell you that.'" Webb acknowledged on cross-examination that she was not a union member, had never attended a union meeting, never distributed material on behalf of the Union or contacted the Union until after January 1, 1982. Accordingly, I do not credit Webb's testimony where it conflicts with that of Jackson, and specifically with respect to what she claims Jackson told her either at the end of October or on December 31. Further, the record also shows that 15 Silver Spur employees who did not sign a decertification petition were hired by the Horseshoe. The evidence makes it abundantly clear that Webb was not refused employment by the Horseshoe because of her failure to sign the decertification petition, but because of work-related deficiencies. Accordingly, I find that the General Counsel has failed to establish by a preponderance of the evidence the allegations contained in paragraphs 7(a)(ii), 7(b), 8, and 9 of the complaint and I recommend their dismissal.

[17] Webb was corroborated by Barber.

[18] Webb was the only employee Hughes stated he did not want hired at the Horseshoe.

[19] 228 NLRB 1147 (1977).

D. *Withdrawal of Recognition*

As set forth infra, the order to bargain with the Union became final on June 8, with the Supreme Court's denial of a rehearing. After preliminary correspondence, negotiating sessions were held on October 28, November 11, and December 3. Kling testified that sometime in November, during negotiations for the sale of the Silver Spur, representatives of the Mason Corporation were informed that the Silver Spur was bargaining with the Union, and that a couple of decertification petitions had been circulated which a "large majority of the employees" had signed. At the last meeting between the Silver Spur and the Union, the Union was informed that the Silver Spur and the Union was in the process of being sold to the Mason Corporation and that any contract reached would have to terminate December 31. By letters dated December 24 and 30, a union official wrote letters to Stuart Mason in an effort to resume bargaining with the Horseshoe. On January 1, 1982, the merged businesses continued to do business under the ownership and control of the Mason Corporation. By letter dated January 29, 1982, the attorney for the Mason Corporation wrote the Union as follows:

> Dear Mr. Sirabella:
>
> This office represents Mason Corporation, which owns and operates Reno's Horseshoe Club. As of midnight, December 31, 1981, Mason Corporation acquired all the issued and outstanding stock of 221 N. Virginia St., Inc., which corporation owned and operated the Silver Spur Casino at 221 North Virginia Street, Reno, Nevada. The Silver Spur Casino surrendered its gaming license to Nevada gaming authorities as of midnight, December 31, 1981, and the former Silver Spur Casino became a part of the Horseshoe Club operated by Mason Corporation.
>
> It is our understanding that the former owners of the Silver Spur terminated all their employees prior to the surrender of their gaming license, but that the majority of them were hired by the Horseshoe Club. Since the Silver Spur Casino has surrendered

its gaming license, there is of course no entity for you to resume collective bargaining with.

I would appreciate it if any further correspondence concerning this matter would be directed to this office.

On February 3, 1982, the instant charge was filed.

The General Counsel argues that, as a successor, the Horseshoe had a duty to bargain with the Union since a majority of the unit employees employed by the Horseshoe had been employed by the predecessor Silver Spur, whose presumption of majority continues to apply, and absent evidence that the Horseshoe relied on a good-faith doubt of the Union's majority based on legitimate objective considerations, its refusal to bargain is unlawful. In any event, in light of the predecessor's unfair labor practices, the successor is not privileged to withdraw recognition.

Respondent argues that "when a successor takes over a predecessor's business, his obligation to bargain, established in *Burns*, is relieved if he has a good-faith doubt based on objective factors, of the union's majority status." Here, the successor Horseshoe Club is excused from bargaining by a clearly established good-faith doubt. Respondent Horseshoe relies on five factors which it contends rebut the presumption of majority:

(1) No grievances have been processed by the Union or raised by employees.

(2) The Union never appointed a steward.

(3) Employee turnover has been overwhelming, 1,219 employees having occupied approximately 70 positions since 1979, a period of just over two years.

(4) Employees informed the employer of their disenchantment with the Union.

(5) The filing of the decertification petition, especially where the employer is aware that a majority of employees signed the petition.

Conclusions

At the outset, it is noted that the initial refusal to bargain made in the January 20, 1982 letter to the Union gives as the reason, "Since the Silver Spur Casino has surrendered its gaming license, there is of course no entity for you to resume bargaining with." As the Horseshoe is the successor to the Silver Spur, a fact which the Horseshoe now acknowledges, the bargaining obligation did continue. It is also noted that Silver Spur did not withdraw recognition even though there was a decertification petition on file with the Board on November 18, and Kling had examined and copied the employee petitions supporting it. It is further noted that, on December 8, the Regional Director dismissed the decertification petition (R. Exh. 7) on the ground the Union had not enjoyed a "'reasonable time' under the circumstances herein, to engage in collective bargaining with the employer towards consumation of an agreement."[20] It is also noted that the sales agreement between the Silver Spur and Horseshoe contains, in pertinent part, the following:

LABOR RELATIONS

The Corporation is presently under order of the National Labor Relations Board to begin bargaining negotiations with the Restaurant Employees and Bartenders Union Local 86. There is presently on file an application for decertification. For further particulars and information, the Buyer is directed to Clinton Knoll of the Employers' Council of Reno, Nevada and Robert V. Magor, Esq., 1 Embarcadero Center, San Francisco, California 94111, for further particulars regarding this matter.

The naked fact that a decertification petition has been filed would not appear to be enough to rebut the presumption of continued majority. It must additionally be established that the petition was "supported by a majority of the employees." Here it was not shown that the Mason Corporation's knowledge of that fact derived from anything more than Kling's statement during sales negotiations in November that decertification petitions had been circulated which had been signed by a "large majority" of the employees. Kling, however, became the agent of the Horseshoe in December, and remained so thereafter, becoming its manager on January 1, 1982; thus, his knowledge of the petitions and the circumstances surrounding their origin must be imputed to the Horseshoe.

By its unlawful conduct in encouraging and assisting in the circulation of the decertification petitions, the Silver Spur forfeited any right it may have had to claim good-faith doubt of the Union's majority status.[21] Nor does the successor whose claimed good-faith doubt is based on its predecessor's unlawful conduct stand in any better position, especially, as here, where its agents had knowledge of, and had participated in, the unlawful conduct. An employer with knowledge of wrongdoing which stands as the principal reason for doubting majority can scarcely claim the doubt to have arisen in good faith. Accordingly, I find that the Horseshoe's claim of good-faith doubt which is grounded on the decertification petitions is without merit.

Another factor on which the Horseshoe relies in deciding to withdraw recognition is that employees informed the employer of their disenchantment with the Union. It is clear from the record, however, that Barber was the only employee with whom either of Respondent's representatives spoke regarding the employee's likes or dislikes regarding the Union. In *Golden State Habilitation Center*, 224 NLRB 1618, 1619 (1976), at the Board acknowleged that while employees' statements are some indication of employee dissatisfaction, "they are entitled to little weight to the extent they purport to convey the sentiments of employees other than themselves. Otherwise, a few antiunion employees could provide the basis for a withdrawal of recognition when in fact there is ac-

[20] Affirmed by the Board on February 5, 1982.

[21] *Fremont Newspapers*, 179 NLRB 390 (1969).

tually an insufficient basis for doubting the Union's continued majority."

Other factors relied on to rebut majority status are that no grievances were processed by the Union or raised by employees, and the Union never appointed a steward. Similar contentions with respect to processing grievances have been rejected by the Board where, as here, the respondent has not demonstrated that grievances existed or were unprocessed by the union, or that the union was lax in carrying out its obligations in this regard. *Sahara-Tahoe Hotel*, 241 NLRB 106 (1979); *Club Cal-Neva*, 231 NLRB 22 (1977); *Palace Club*, 229 NLRB 1128 (1977); *Nevada Lodge*, 227 NLRB 368 (1976). With respect to whether or not a steward had been appointed, that is an internal union matter and in no way reflects a lack of employee support for the union.

Another factor relied on to rebut majority is the "overwhelming" turnover among the employees, there having been 1219 employees having occupied 70 positions over the last 2-year period. The Board, with court approval, has repeatedly held "that turnover among employees cannot, by itself, be used as a basis for belief that a union has lost majority support since it presumed that, absent evidence that would justify a contrary conclusion, new employees will support the union in the same ratio as those whom they have replaced." *Golden State Habilitation Center*, supra at 1620.

On the foregoing evidence and precedents, I conclude that Respondent Horseshoe has failed to show that it had a reasonably based doubt on objective considerations that the Union did not enjoy majority status at the time it refused to recognize and bargain with the Union, and that by refusing to recognize and bargain with the Union, Respondent Horseshoe violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent Silver Spur is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Horseshoe is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Since January 1, 1982, Respondent Horseshoe has been the legal successor of Respondent Silver Spur in the ownership, operation, and management of the latter's Reno, Nevada facility.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time bar and culinary employees, including boiler cooks, fry cooks, cooks, pantry persons, bakers, dishwashers, potwashers, porters, captains, hostesses, food and cocktail waiters/waitresses, busboys/busgirls, cashiers, bartenders, and barboys/bargirls, employed by Respondent Horseshoe at its 221 N. Virginia Street and 229 N. Virginia Street, Reno, Nevada facilities; excluding all other employees, guards, and supervisors as defined in the Act.

6. The Union is the exclusive representative of the employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

7. By encouraging and assisting employees to repudiate the Union, Respondent Silver Spur has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

8. By withdrawing recognition from the Union and by refusing to meet with the Union on and after January 29, 1982, Respondent Horseshoe Club violated Section 8(a)(5) of the Act.

9. By the foregoing conduct, Respondents have interfered with, restrained, and coerced employees in the exercise of the rights guaranteed to them by Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

10. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that they be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

On foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

A. Respondent 221 N. Virginia Street, Inc. d/b/a Silver Spur Casino, Reno, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) In any manner or by any means, including orders, directions, instructions, requests, suggestions, or appeals or by permitting any such to remain in existence or effect, causing, inducing, urging, encouraging, requesting, or assisting employees to decertify and repudiate Hotel, Motel, Restaurant Employee & Bartenders Union, Local No. 86, Hotel Employees & Restaurant Employees International Union, AFL-CIO, or any other labor organization, or to rescind the authority of the foregoing named labor organization, or any other labor organization, to represent them for the purposes of collective bargaining.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Mail one copy of the attached notice marked "Appendix A"[23] to each employee who was employed by it at any time during the period from October 20, 1981, through December 31, 1981, on receipt therefrom from the Regional Director for Region 32.

(b) Notify the Regional Director for Region 32 in writing within 20 days from the date of this Order what steps have been taken to comply.

B. Respondent Mason Corporation d/b/a Reno's Horseshoe Club, Reno, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to recognize and bargain with Hotel, Motel, Restaurant Employees & Bartenders Union, Local No. 86, Hotel Employees & Restaurant Employees International Union, AFL-CIO, as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time bar and culinary employees, including boiler cooks, fry cooks, cooks, pantry persons, bakers, dishwashers, potwashers, porters, captains, hostesses, food and cocktail waiters/waitresses, busboys/busgirls, cashiers, bartenders, and barboys/bargirls, employed by Respondent Horseshoe at its 221 N. Virginia Street and 229 N. Virginia Street, Reno, Nevada facilities; excluding all other employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with Hotel, Motel, Restaurant Employees & Bartenders Union, Local No. 86, Hotel Employees & Restaurant Employees International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees and, if an understanding is reached, embody such understanding in a signed agreement. The unit found appropriate for the purpose of collective bargaining is:

> All full-time and regular part-time bar and culinary employees, including boiler cooks, fry cooks, cooks, pantry persons, bakers, dishwashers, potwashers, porters, captains, hostesses, food and cocktail waiters/waitresses, busboys/busgirls, cashiers, bartenders, and barboys/bargirls, employed by Respondent Horseshoe at its 221 N. Virginia Street and 229 N. Virginia Street, Reno, Nevada facilities; excluding all other employees, guards, and supervisors as defined in the Act.

[23] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Post at its Reno, Nevada place of business copies of the attached notice marked "Appendix B."[24] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative of the Respondent Mason Corporation d/b/a Reno's Horseshoe Club, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges that either Respondent violated the Act otherwise than found herein.

[24] See fn. 23, supra.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a trial at which all parties had the opportunity to present evidence, the National Labor Relations Board found that we violated the National Labor Relations Act and has ordered us to notify you that

WE WILL NOT in any manner or by an means, including orders, directions, instructions, requests, suggestions, or appeals or by permitting any such to remain in existence or effect, cause, induce, urge, encourage, request, or assist you to repudiate or decertify Hotel, Motel, Restaurant Employees & Bartenders Union, Local No. 86, Hotel Employees & Restaurant Employees International Union, AFL-CIO, or any other labor organization, or rescind the authority of the foregoing labor organization, or any other labor organization, to represent you for the purposes of collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

221 N. VIRGINIA ST., INC. D/B/A SILVER SPUR CASINO

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a trial at which all parties had the opportunity to present evidence, the National Labor Relations Board

found that we violated the National Labor Relations Act and has ordered us to post this notice.

WE WILL recognize and, on request, bargain with Hotel, Motel, Restaurant Employees & Bartenders Union, Local No. 86, Hotel Employees & Restaurant Employees International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with reagrd to wages, hours, working conditions, and other terms and conditions of employment of the unit employees and, if an understanding is reached, embody such understanding in a signed agreement. The unit found appropriate for the purposes of collective bargaining is:

> All full-time and regular part-time bar and culinary employees, including boiler cooks, fry cooks, cooks, pantry persons, bakers, dishwashers, potwashers, porters, captains, hostesses, food and cocktail waiters/waitresses, busboys/busgirls, cashiers, bartenders, and barboys/bargirls, employed by Respondent Horseshoe at its 221 N. Virginia Street and 229 N. Virginia Street, Reno, Nevada facilities; excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT refuse or fail to do the foregoing and WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

MASON CORPORATION D/B/A RENO'S HORSESHOE CLUB